BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NATHAN SEXTON Claimant VS. **BARRETT CEMENT COMPANY** Respondent AND **ALLIED MUTUAL INSURANCE COMPANY** Insurance Carrier	)	Docket No. 193,688

ORDER

Respondent and insurance carrier appeal from a Preliminary Hearing Order of August 8, 1995, wherein Administrative Law Judge Floyd V. Palmer granted claimant temporary total disability compensation benefits for twelve and eighty-six one hundredths (12.86) weeks commencing April 25, 1995.

ISSUES

(1) Whether the Administrative Law Judge exceeded his jurisdiction in granting temporary total disability benefits despite the application of certain defenses offered by the respondent and insurance carrier;
(2) Whether the Administrative Law Judge exceeded his jurisdiction in granting the claimant twelve and eighty-six one hundredths (12.86) weeks of temporary total disability compensation when the claimant's actions show that the claimant unreasonably refused to submit to medical treatment;
(3) Whether the Administrative Law Judge exceeded his jurisdiction in granting the claimant twelve and eighty-six one hundredths (12.86) weeks temporary total disability compensation where there is a lack of competent evidence on which to base a finding of temporary total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board must first determine whether it has jurisdiction to review this appeal from a preliminary hearing order. The Order for Compensation dated August 8, 1995, from which respondent appeals, deals solely with the issue of temporary total disability compensation. K.S.A. 44-551(b)(2)(A), as amended by S.B. 59 (1995), states in pertinent part:

> "If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing."

K.S.A. 44-534a(a)(2) clearly grants authority to the Administrative Law Judge to make a preliminary award of temporary total disability compensation. That statute further makes provision for the jurisdiction of the Appeals Board to review preliminary hearing orders:

> "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board."

Respondent contends that the claimant failed to cooperate with the recommended medical treatment by failing to regularly attend his scheduled physical therapy sessions. In support of its position, respondent shows that claimant attended only fourteen (14) of his twenty-seven (27) appointments. K.A.R. 51-9-5 provides:

> "An unreasonable refusal of the employee to submit to medical or surgical treatment, where the danger to life would be small and the probabilities of a permanent cure great, will justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation but only after a hearing as to the reasonableness of such refusal.
>
> "The penalty provided for the refusal to submit to an examination will be rigidly enforced. There shall be the utmost co-operation between the parties throughout to ascertain the true facts."

Respondent contends that an allegation that claimant unreasonably refused to submit to medical treatment constitutes a certain defense under K.S.A. 44-534a(a)(2) such that the preliminary order entered by the Administrative Law Judge is subject to review by the Appeals Board.

The question of the Appeals Board's jurisdiction to review this Order turns upon what is meant by a "certain defense". Unfortunately, the statute provides little guidance. The Appeals Board does not find that there exists a category of defenses to workers compensation claims known as "certain defenses". Rather, the phrase "certain defenses"

is analogous to *some* defenses as opposed to *any* defenses or *all* defenses. The word "certain" as used in K.S.A. 44-534a is intended to limit the type and character of defenses which can be said to give rise to Appeals Board jurisdiction. For insight into the certain type of defenses contemplated by the statute, we must look to the other issues specified in K.S.A. 44-534a which, if disputed, are considered jurisdictional. They include: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; and (3) whether notice is given or claim timely made. What these jurisdictional issues have in common is that they all go to the compensability of the claim. In other words, for a workers compensation claim to be compensable each and every one of the issues listed, if disputed, must be proven by a claimant before he or she can recover any benefits under the Workers Compensation Act. The Appeals Board has previously held, and hereby reaffirms the proposition that the certain kind of defenses contemplated by K.S.A. 44-534a(a)2 are defenses which go to the compensability of the claim. Examples of these type of defenses would be an allegation of a willful failure to use a guard or the intoxication defense.

The defense raised by the respondent, herein, if successful, would ". . . justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation [or treatment] . . . ." K.A.R. 51-9-5. Thus, the defense of an unreasonable refusal by an employee to submit to medical or surgical treatment, if successful, does not result in a finding that the claim is not compensable but rather can result in a cessation of benefits. Even with such a finding a claimant may still been entitled to benefits previously ordered or that pre-date the applicability of the defense. Nor would a respondent be entitled, for example, to reimbursement from the Workers Compensation Fund for medical or temporary total disability benefits previously provided under K.S.A. 44-534a(b) under circumstances where benefits are cut-off pursuant to K.A.R. 51-9-5. Furthermore, a finding pursuant to K.A.R. 51-9-5 that an employee has unreasonably refused to submit to medical treatment such that compensation should be terminated is an interlocutory order which can be altered or rescinded based upon a change of circumstances or otherwise a re-hearing. As stated previously, such a finding does not go to the ultimate question of the compensability of the claim, but instead to the issue of claimant's entitlement to ongoing or future benefits. These examples all support a finding that, unlike the defense's alleging intoxication or a willful failure to use a guard, the provisions of K.A.R. 51-9-5 do not constitute a defense which should be considered jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary order.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the appeal of respondent and its insurance carrier should be, and is hereby, dismissed and the Order of Administrative Law Judge Floyd V. Palmer, dated August 8, 1995, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Emporia, Kansas
Matthew S. Crowley, Topeka, Kansas
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director